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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 14, Original

FORREST HOLIDAY,

Petitioner,

vs.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA.

PETITION FOR WRIT OF CERTIORARI TO THE UNTED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FORREST HOLIDAY,
Pro se.

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JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Forrest Holiday, here applies for a writ of certiorari addressed to the Ninth Circuit Court of Appeals commanding it to certify to the Supreme Court a copy of the record in the above cause for the purpose of having the Circuit Court's decision reviewed in the Supreme Court.

Jurisdiction.

The Supreme Court has jurisdiction to issue a writ of certiorari under the provisions of 28 U. S. C. section 347(a).

Summary of Issues.

The reasons assigned why petitioner believes the writ of certiorari should issue and the decision in the courts below be reviewed are summarized below and more particularly enlarged thereafter:

(a) Habeas corpus is proper remedy where an accused entered plea of guilty to vague if not void indictment without the assistance or waiver of counsel.

(b) Habeas corpus is proper remedy where an accused was sentenced to conflicting sentences to run consecutively on conflicting counts of the indictment.

(c) None of the evidence adduced against petitioner was material, but if material, none was admissible because petitioner was denied right to cross-examine the witnesses.

(d) The District Court has no jurisdiction to issue a writ of habeas corpus returnable before a referee.

Enlargement.

This action first began as a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division at San Francisco. *Re Forrest Holiday on Habeas Corpus,* No. 22940-W.

Subsequent to the filing of petition, on the 3rd day of March, 1940, petitioner employed counsel and amended his petition, adding thereto allegations that he had not competently and intelligently waived the assistance of counsel.

A writ of habeas corpus issued returnable before a United States Commissioner. Petitioner's testimony was taken by said Commissioner in the Federal Penitentiary at Alcatraz, California, on the 19th day of December, 1940. Said Commissioner months afterwards filed with the Court a document he represented to be a finding of facts and conclusions

of law, in which he completely ignored the sentencing court's records themselves as evidence and cited cases not in point with petitioner's case. The District Court adopted the findings of the Commissioner and denied the writ of habeas corpus. Petitioner was unable to obtain a copy of the transcript and most of the testimony. Some of the proceedings petitioner obtained from the Attorney employed and paid to represent him. Said attorney states that he was never given notice the writ of habeas corpus was denied, and petitioner was given no such notice until after he filed mandamus in the Circuit Court to compel action in the court below.

In due time, petitioner applied to the District Court for leave to appeal in forma pauperis, from the order of the District Court's order denying habeas corpus, assigning errors and showing sufficient cause for the appeal. The District Court denied leave to so appeal on the 9th day of August, 1940. Application was immediately made to the Circuit Court for the Ninth Circuit for leave to appeal in forma pauperis and, on the 5th day of September, 1940, leave to appeal was denied. The decision of the Circuit Court reads as follows:

Order.

In the Matter of the Application of FOREST HOLIDAY for Leave to Appeal in Forma Pauperis.

Before Wilbur, Mathews and Healy, Circuit Judges.

Application for leave to appeal in forma pauperis is denied.

CURTIS D. WILBUR,
CLIFTON MATHEWS,
WILLIAM HEALY,
United States Circuit Judges.

(Endorsed:) Filed September 5, 1940. Paul P. O'Brien, Clerk.

The order of the District Court denying leave to appeal reads as follows:

Order and Certificate on Allowance of Appeal in Forma Pauperis.

In his application for a writ of Habeas Corpus, petitioner makes two contentions. First, that at the time he pleaded guilty to the indictment returned against him in the Southeastern Division of the District of North Dakota, he was deprived of his constitutional right to the assistance of counsel for his defense. Second, that the two counts of the indictment stated the same offense and that his conviction and sentence on both counts constituted double jeopardy.

As to the second contention, it appears that his sentence of ten years under the first count has not expired. The rendition of this sentence for the offense charged in said count was within the jurisdiction and power of the court imposing it, and this application for a writ of habeas corpus based on any alleged invalidity of the sentence imposed under the second count is premature and cannot be considered.

McNally *v.* Hill, 293 U. S. 131, 55 Sup. Ct. 24.

As to petitioner's other contention, that he was deprived by the sentencing court of his constitutional right to the assistance of counsel for his defense. A writ of habeas corpus was issued herein, returnable before Earnest E. Williams, United States Commissioner. A full hearing was held at Alcatraz Penitentiary, and the report, findings and recommendation of the Commissioner are on file herein. After an examination of the transcript of the proceedings had at this hearing, the testimony of the petitioner, the evidence presented by the respondent and the record filed as a part of the return, this Court determined that petitioner had failed to sustain the burden imposed on him of proving that he was deprived of his Constitutional right to the assistance of Counsel for his defense and that the evidence amply supported the finding of the Commissioner that the petitioner competently and in-

telligently waived his right to the assistance of Counsel; and adopting and approving the report, findings and recommendation of said United States Commissioner, the writ was discharged.

For the reasons hereinabove set forth,

It is hereby certified, that in the opinion of the undersigned, there is no merit in the application for appeal now before the Court, and said appeal in forma pauperis is therefore denied.

Dated August 9, 1940.

MARTIN I. WELSH,
United States District Judge.

The Evidence Adduced.

Upon the so called hearing of this case, petitioner was denied his statutory and constitutional right to cross-examine the witnesses of the respondent. However, the evidence was fully sufficient to prove conclusively that petitioner did not competently and intelligently waive the assistance of counsel at the time he entered a plea of guilty.

Evidence for Respondent.

In legal substance, the respondent adduced no evidence whatever. The sentencing Judge deposed that, for years, he had practiced appointing counsel for defendants unable to employ counsel, and that while he could not remember advising petitioner of his right to counsel in this instance, he felt morally certain that he had done so. The United States Attorney testified substantially the same as the sentencing Judge, basing his conclusions on how he felt to a "moral certainty" without knowledge of the actual facts. A deputy United States Marshal, in conflicting statements and un-cross-examined, swore petitioner told him after sentence was imposed that petitioner obtained no counsel because he had no use for one and was afraid of getting

"the book thrown at him"; he so testified from a position in which only he and petitioner were present.

Evidence for Petitioner.

Undisputed, petitioner swore he did not know he had a right to demand assistance of Counsel when he had no money with which to pay the fee, and swore he did not waive the assistance of Counsel.

Undisputed, petitioner swore to facts that Department of Justice Officers intimidated him to sign a statement implicating petitioner in the bank robbery involved, and to plead guilty.

Undisputed, it appears that petitioner plead guilty upon a reading of the indictment, and without ever having possession of the indictment.

Undisputed, it appears that, after petitioner plead guilty to the first count of the indictment, the second count was read and petitioner was asked to plead to it and petitioner "hesitated", whereupon the trial court instructed petitioner that "anyone who was guilty of any part of it (indictment) was guilty of all", which instruction, in substance, was an order of the court for petitioner to plead guilty to count two.

Undisputed, it appears that petitioner was in custody at the time of his plea of guilty.

Undisputed, it appears that petitioner did not understand the charges against him.

Undisputed, it appears that, to say the least, the indictment should have been demurred to, and the petitioner was denied his right to so demur.

Undisputed, it appears that the court itself did not understand the charges and, to say the least, imposed erroneous sentences.

Analysis of Statute.

The indictment, in two counts, was drawn under T. 12 U. S. C. subsection (a) and (b) of Section 588 (b), as amended May 18, 1934, C. 304, Sec. 2, 48 Stats. 783.

The pertinent parts of the statute provide as follows:

> "(a) Whoever, *by force or violence* or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.
>
> (b) Whoever, in committing or attempting to commit, any offense defined in subsection (a) of this section *assaults* any person, *or puts in jeopardy* the life of any person *by the use of a dangerous weapon or device*, shall be fined not less than $1,000 nor more than $10,000 or imprisoned not less than five nor more than twenty-five years, or both" (28 U. S. C. Section 588 (b); all italics added).

There are conflicting appellate rules interpreting the above Section 588 (b), subsections (a) and (b). The District of Columbia Court of Appeals holds that subsections (a) and (b) define different and separate crimes; while several Circuit Courts hold that the purpose of the statute is to define one crime of robbery in three degrees, and that where all three degrees are alleged sentence can be imposed on the greatest degree only.

Hewitt v. *United States* (C. C. A. 8), 110 F. (2d) 1, — where all the cases are listed.

In the *Hewitt* case, *supra*, the court said at page 11:

> "We think that the conclusion reached by the Fifth Circuit in the case of Druett *v.* U. S., supra (107 F. 2nd 438, 439) is correct. Congress, in enacting 588 (a) and

588 (c) was dealing with the crime of bank robbery, and not with forcible taking, putting lives in fear, assault, putting lives in jeopardy, killing and kidnapping as distinct crimes. In effect, Congress created three classes of bank robbery according to degree; first, that which was accompanied by force or by putting in fear; second, that which was accompanied by an assault or putting lives in jeopardy; and, third, that which was accompanied by killing or kidnapping. Proof of robbery of the first class would also prove robbery of the second class and proof of robbery of the third class would also prove robbery of both the second and first classes.

"Our conclusion is that robbery of the University bank constituted, for the purpose of the sentence, but one offense, *and that no sentence should have been imposed under the first* count of the indictment" Hewett *v.* U. S. (C. C. A. 8), 1, 11; italics added).

Assuming but not conceding the validity of the above rule, it appears that no sentence should have been imposed under count one of petitioner's indictment. In such an instance, it is the duty of the sentencing court (*Fleisher* v. *U. S.*, 302 U. S. 218) to amend its judgment and fix a date for the second sentence to commence to run.

In petitioner's case, however, the courts below, without mentioning the fact, overruled the *Hewitt* case, *supra*, adopting the District of Columbia Appeal Court rule cited in the *Hewitt* case, *supra*.

Said conflicting decisions, however, are both erroneous as to the true construction of Section 588 (b), *supra*. The punishments provided in each subsection are different, so that, unless the degree theory of construction will stand, subsections (a) and (b) are void.

The following provisions should be weighed:

(a) "Whoever, * * * by *force or violence* * * *",
(b) Whoever, * * * *Assaults* any person or *puts*

in jeopardy * * * by the *use* of a *dangerous weapon or device* * * *".

"Force and violence", as used in subsection (a) are words synonymous in meaning with the words "assaults and puts life in jeopardy by the use of a dangerous weapon or device" as used in subsection (b). One of the best tests of such a construction is to consider any possible instruction to a jury in a case where trial was had on both subsections (a) and (b) on two counts of an indictment drawn as petitioner's is. How could the jury determine from evidence where "force and violence" end and where "assault and jeopardy" begin? The fact is: both "assault" and "jeopardy" are essential elements of robbery, and the greater crime of robbery as defined by subsection (a) includes everything contained in the "assault and jeopardy" of subsection (b), while the lesser crime of "assault and jeopardy" is punishable by a greater punishment than that of the greater crime in which it is an element.

Congress had power to prohibit either robbery or jeopardy. If jeopardy and assault were punishable by less than robbery, there would be no objection to the law. Greater punishment for a single element than that for a whole crime, however, sets up conflicting punishments for the same crime and both punishments are void.

Points and Authorities.

1

Habeas Corpus is proper remedy where an accused plead guilty to vague indictment without the assistance or waiver of counsel.

In *Johnson* v. *Zerbst*, 58 S. Ct. 1019, the Supreme Court decided habeas corpus to be proper remedy where an accused was convicted without the assistance or waiver of counsel. The *Johnson* case, however, does not decide what

constitutes "an intelligent and competent waiver of counsel". The Supreme Court did say there:

> "The determination of whether there has been an intelligent waiver of the right of Counsel must depend, in each case, upon the particular facts and circumstances surrounding that case. * * *" (Johnson *v.* Zerbst, 58 S. Ct. 1019, 1023.)

The above rule, it will be observed, is a rule of evidence, that is to say, it defined the method of determining whether or not there was a "competent and intelligent" waiver of the constitutional right to counsel. That method is to be applied by other courts in determining whether, at the proper time, the sentencing court heard the issue and determined the facts as to waiver of counsel, and in this connection the Supreme Court said:

> "(4) The Constitutional right of an accused to be represented by counsel *invokes of itself, the protection of a trial court.* * * * This protecting duty imposes the serious and weighty responsibility upon the *trial judge* of determining whether there is an intelligent and competent waiver by the accused". (Johnson *v.* Zerbst, 58 S. Ct. 1019, 1023; italics added.)

In other words, a petition for habeas corpus, a complete collateral attack, operates exactly as an appeal; the reviewing court is not authorized to inquire into any matter which was not before the sentencing court, that is to say, habeas corpus does not authorize a new trial of the issue of whether proper waiver of counsel was made, but reviews the trial of that issue as it was tried in fact by sentencing court. Over and over again habeas corpus is held to be of such a nature. In *Johnson* v. *Zerbst, supra,* the Supreme Court said:

> "* * * the petitioned Court has 'power to inquire with regard to the jurisdiction of the inferior Court,

> either in respect to subject matter or to person, even if such inquiry (involves) an examination of ***Facts outside of, but not inconsistent with the record.'*** In re Mayfield, 141 U. S. 147; In re Cuddy, 131 U. S. 280." (Johnson *v.* Zerbst, 58 S. Ct. 1019, 1024; italics added.)

"Facts outside of but not inconsistent with the record", within the meaning of the above rule, limits habeas corpus to a trial *de nova* of jurisdiction. The record itself—that is to say, all the proceedings, findings, and evidence on which the findings were based—must stand for what they are worth, without being enlarged or extended by additional proof of the same facts tried or disproof of those facts.

In this habeas corpus action, for instance, petitioner alleged that no proceedings were had in the court of first instance relative to waiver of counsel and (2) that petitioner himself had no knowledge of the law. The court of first instance, when making no inquiry into the subject matter of waiver of right to counsel, cannot be said to have found, on evidence, that petitioner "competently and intelligently waived his right to Counsel" in the meaning of *Johnson* v. *Zerbst, supra.* Where "the Sixth Amendment invokes, of itself, the protection of a trial Court," as said in *Johnson* v. *Zerbst, supra,* failure of the court to perform its official duty under the Constitution forecloses a trial in habeas corpus action of facts the sentencing court could have based a finding on had it performed its official duty. The trial Judge himself, as well as the United States Attorney who prosecuted the case, both swore positively that they had no knowledge of any proceeding and finding as to waiver of counsel, and nobody else testified to such a proceeding.

In considering the indictment on habeas corpus, therefore, the general rules as to indictments do not apply. Petitioner, having never heard of such a thing as a demurrer,

may not be denied habeas corpus because he should have demurred.

> "While it is settled law that the writ of habeas corpus cannot be employed as a substitute for a writ of error (now an appeal) and can go only to the question of jurisdiction and legality of sentence, yet if the government, through its officers, makes it impossible for the convicted person to secure and prosecute a writ of error from such conviction, he has a remedy, by habeas corpus, to raise all the questions he might have raised under the perfected writ of error". (Briggs *v.* White (C. C. A. 8), 32 F. 2nd 108, 110.)
>
> "Of the contention that the law provides no effective remedy for such a deprivation of rights effecting life and liberty it may well be said—as in Mooney *v.* Holohan, 224 U. S. 103, 113, 55 S. Ct. 340, 342, 79 L. Ed. 791, 98 A. L. R. 406,—that 'it falls with the premise'. To deprive a citizen of his only effective remedy would not only be contrary to the 'rudimentary demands of justice' (Mooney *v.* Holohan, supra) but destructive of a constitutional guarantee specifically designated to prevent injustice." (Johnson *v.* Zerbst, 58 S. Ct. 1019, 1024.)
>
> The state may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—*without supplying protective process.* Moore *v.* Dempsey, 261 U. S. 86, 91." (Brown *v.* Mississippi, 56 S. Ct. 461, 465; italics added.)

The indictment in this case charges a bank robbery in count one and the putting of life in jeopardy in count two. The court imposed ten years in count one and fifteen years in count two, ordering the sentences to run consecutively. These sentences, as appears in the next point below and to say the least, put petitioner twice in jeopardy for the same offense. If the court had jurisdiction to impose either of the sentences—a fact petitioner denies—the decisions, as mentioned above, are conflicting as to which sentence is

valid. But aside from that conflict, no evidence was adduced to show which count sentence could be imposed on. Trial of the case on demurrer would have compelled the prosecution to stand on one count, to say the least.

We conclude that, where petitioner entered a plea of guilty to such indictment without the assistance of counsel and without waiver of such assistance, and where the sentencing Judge advised petitioner that anyone guilty of any part of the indictment was guilty of all, habeas corpus was proper remedy.

> "* * * but it is equally true that the provision (for counsel) was inserted in the Constitution *because the assistance of counsel was recognized as essential to any fair trial for a case against a prisoner.*" (Powell *v.* Alabama, 287 U. S. 45, 70, quoting with approval Ex parte Chin Loy Yuh, 223 Fed. 833; italics added.)

Furthermore, as to a prisoner in custody, it is a general rule that rights may not be waived.

Diaz v. *U. S.*, 223 U. S. 442;
Hopt v. *Utah*, 110 U. S. 574, 579;
Frank v. *Mangum*, 237 U. S. 309;
Powell v. *Alabama*, 287 U. S. 45;
Ex parte Chin Loy Yuh, 223 Fed. 833.

II.

Habeas corpus is a proper remedy where an accused is sentenced to conflicting sentences ordered to run consecutively.

Habeas corpus is a proper remedy by which to raise the issue of twice in jeopardy where the jeopardy is of a nature that renders the judgment void, and not merely voidable.

Hans Nielsen, Petitioner, 131 U. S. 176;
Ex parte Lange, 18 Wall. (U. S.) 163.

In this case, ten years were imposed on count one and fifteen years on count two of the indictment, sentences

being ordered to run consecutively. Assuming that the court had jurisdiction to impose either one of those sentences, but not both, one of the sentences is void. But which one? The answer is in the statute itself: the punishment is conflicting, that is to say, there is a material difference in both minimum and maximum terms that could be imposed under each count of the indictment.

Hence, to say the least, the valid sentence could be only the one proved by evidence to have been committed. If the indictment set up a material conflict as to what crime was committed, count one alleging one crime and count two another, each punishable by a materially different punishment, the conflict could be resolved only by evidence. The consecutive sentences, however, prove that no evidence was introduced and that the court construed, applied, and enforced the indictment and statute as defining and charging two separate and distinct crimes.

Even if the statute is constitutional in some respects, it may be attacked as unconstitutional because of the construction put on it in a given case.

Nashville C. & St. L. R. Co. v. *Wallace*, 288 U. S. 249.

> "The validity of a statute is drawn in question whenever the power to enact it, as it is by its terms *or is made to read by construction*, is fairly open to denial, and is denied." (*Miller* v. *Cornwall Ry. Co.*, 168 U. S. 132; italics added.)

In the District Court below, *McNally* v. *Hill*, 293 U. S. 131, was cited as authority that *habeas corpus* may not be resorted to when an unexpired sentence is legal and release is sought from a void sentence not being served at the particular time. Petitioner agrees with that rule. That case, however, is not in point with petitioner's case. While petitioner did contend in the District Court that the second sentence was void, he also contended that the whole judgment was void.

The gist of this matter is: where only one possible sentence could be imposed, if any, the Court imposed conflicting sentence for the same crime, ten years on count one and fifteen years on count two, ordering those sentences to run consecutively, so that no court has power to sever the sentences and say that either one may be served. The situation does not differ substantially from one in which, on one count, a court imposed ten years at one time and later changed that sentence to fifteen years. Such a second sentence would be void on its face and the first vacated.

Ex parte Lange, 18 Wall. (U. S.) 163, 173.

That conclusion is compelling where subsections (a) and (b) of section 588(b) T. 12, U. S. C., provide for conflicting punishments for the same crime. Subsection (a) punishes robbery by means of "force and violence", and subsection (b) punishes the same robbery and "Jeopardy" of life "by the use of a dangerous weapon".

No distinction can be made between putting life in jeopardy on the one hand and force and violence on the other. The act of actually firing a weapon and shooting a person in a robbery is "force and violence" which is an essential element of robbery; it may be "jeopardy" too, which is also an essential element of robbery. It is to be observed, however, that putting a person's life in jeopardy by the use of a dangerous weapon is a vague and indefinite clause; where it begins is not certain; how it is to be determined has never been and doubtless cannot be defined. How can a jury say that a certain act put a person's life in jeopardy? How is that to be distinguished from "force and violence"?

> "* * * this Court has settled that the test of identity of offenses is whether the same evidence is required to sustain them * * *"
>
> (Morgan *v.* Devine, 237 U. S. 632, 641.)
>
> Gaviers *v.* U. S., 220 U. S. 338, 341.

"The elementary rule is that penal statutes must be strictly construed, and it is essential that the crime punished must be plainly and unmistakably within the statute." (Balleu *v.* U. S., 160 U. S. 187, 16 S. Ct. 263, 267.)

Petitioner has pointed out in the next point above that, at the time of sentence, the sentencing Judge advised petitioner that anyone guilty of any part of the indictment was guilty of all. Petitioner so testified in the Court below and the sentencing judge, who filed a deposition against petitioner, did not deny such advice to petitioner; neither did the United States Attorney deny such fact. Such instruction was equivalent to a rule that both counts of the indictment charged the same offense.

It therefore appears that the sentences are conflicting as to the same offense. In legal effect the sentences cannot be severed.

From another point of view, suppose petitioner had been appointed counsel and a demurrer to the indictment had been filed. Could the court have dismissed one count without returning the grand jury? We think not. Such a dismissal of one count, where the punishments are materially different under each, would have been an amendment of the indictment in violation of the Constitution.

"The opinion which he (the sentencing judge) rendered on the motion in arrest of judgment, referring to this branch of the case, rests the validity of the Court's action in permitting the change in the indictment upon the ground that the words stricken out were surplusage, and were not all material to it, * * * *How can the Court say that there may not have been more than one of the jurors who found this indictment who was satisfied that the false report was made to deceive the Comptroller, but was not convinced it was made to deceive anybody else?*" (*Ex Parte Bain*, 121 U. S. 1, 7, S. Ct. 781, 787; italics added.)

Likewise, if the two subsections in question are materially different in both the definition of crime and the punishment, who could say how many grand jurors voted for the indictment because they were convinced that there was guilt under one count and how many under another? Under the Bain rule, *supra*, the indictment would have been returned to the grand jury upon demurrer or quashed entirely.

Plea of guilty to the indictment without assistance of counsel, together with a sentence for conflicting terms on each count, therefore renders the entire judgment void, and *habeas corpus* lies.

III.

None of the evidence was material; but if material it was inadmissible.

Evidence was introduced to prove that petitioner competently and intelligently waived his right to counsel. The pertinent parts of the evidence read as follows:

> (Sentencing Judge)—" * * * that sentence in the case of United States *v.* Forrest Holiday was imposed more than two years ago, and for that reason I have no independent recollection of making this offer and inquiry in said case, but in view of my long established practice in such cases and the fact that I imposed a long prison sentence, I am positive to a moral certainty that I did so inquire of said Forrest Holiday whether or not he desired to be represented by Counsel before I permitted the plea of guilty to be entered in said case."
>
> (United States Attorney) * * * "I have no independent recollection of what I said to the Defendant nor what the Judge said to the Defendant."
>
> "* * *, I am sure to a moral certainty that Judge Miller followed the custom that prevails in this case."
>
> (Deputy United States Marshal) * * *, and as such Deputy aforesaid, he together with S. J. Doyle,

the United States Marshal for the District of North Dakota, on or about October 22, 1936, transported the petitioner herein, Forrest Holiday, from Fargo, North Dakota, to McNeil Island, Washington under a commitment of the United States District Court for the District of North Dakota; that during the course of said trip said petitioner brought up the subject of the sentence imposed upon him by the Honorable Andrew Miller, * * * This affiant asked petitioner why he had not gotten himself an attorney and stood trial, to which petitioner replied he had no use for an attorney; that he would have been satisfied had he received the sentence promised him, and he further advised this affiant that he had not stood trial because he feared certain things might develop that would not be for the best interest of said petitioner and made the statement:

"I knew I would get the book thrown at me". * * * He (petitioner) claimed that he had made a deal with the F. B. I. men that he would plead guilty and take a twenty-five year sentence, but he did not figure that he was going to get two sentences, ten and fifteen years. He kept telling about that all the time, telling about what a raw deal he got. I asked him "why didn't you get an attorney to fight the case"?

His statement was something to the effect that he couldn't afford to go to Court, that if he did they would hang him. There was more or less conversation all the way down."

Enough has been said under Point I above that the testimony quoted above is immaterial to the issues and proves nothing about any proceeding to determine whether petitioner "competently and intelligently" waived his right to Counsel.

Before any court in a *habeas corpus* proceeding can determine that a "competent and intelligent waiver of the right of counsel" was made in the sentencing Court, the evidence on which the waiver, if any, was held to be "competent and intelligent" must be considered.

The above testimony does not show or indicate one word of evidence that was before the sentencing Judge.

However, if the evidence were material to the issues, petitioner had a constitutional and a statutory right to cross-examine the witnesses.

Alford v. *U. S.*, 282 U. S. 687.

28 U. S. C. sections 639, 640, 641.

The evidence was therefore inadmissible.

These depositions, it will be observed, were taken by the Department of Justice, of which the Attorney General is head.

The Attorney General has custody of petitioner.

18 U. S. C. section 753(f), which provides in part:

> "All persons convicted of an offense against the United States, shall be committed * * * to the custody of the Attorney General of the United States * * * The Attorney General is authorized to order the transfer of any person held under authority of any United States statute * * *" (*In re Berman* (C. C. A.) 80 F. (2nd) 361; Certiorari denied.)

It is further the law that, in all courts of the United States, a prisoner or other person has the right to represent himself.

> "In all the Courts of the United States the parties may plead and manage their own cases personally, or by the assistance of such counsel or attorneys at law as, by the rules of said Courts, respectively, are permitted to manage and conduct actions therein." (28 U. S. C. sec. 394).

The Attorney General, desiring to take depositions against petitioner, should have given petitioner the notice provided for in 28 U. S. C. section 639, and transferred petitioner to the scene so that petitioner could represent

himself and exercise his statutory and constitutional right to cross-examine the witnesses.

IV

The District Court has no jurisdiction to issue a writ of *habeas corpus* returnable before a United States Commissioner.

It is long settled that, in *habeas corpus* cases, legislation is essential to a court's power to issue a writ of *habeas corpus.*

Re Bollman, 4 Cr. 75, 94.

> "That when Congress * * * extended the writ of habeas corpus * * * *procedural regulations were included* * * *" (*Frank* v. *Mangum,* 237 U. S. 309, 330; italics added).
>
> *Johnson* v. *Zerbst,* 58 S. Ct. 1019, 1024.

Such procedural regulations, as is said in *Frank* v. *Mangum, supra,* are in part as follows:

> "The Court, or justice, or judge to whom such application is made shall forthwith award a writ of *habeas corpus,* unless it appears from the petition itself that the party is not entitled thereto." (28 U. S. C. sec. 455.)
>
> "Any person to whom such a writ is directed shall make due return thereof within three days thereafter * * *" (28 U. S. C. sec. 456).
>
> "The person making the return shall at the same time bring the body of the party before the judge who granted the writ." (28 U. S. C. sec. 458.)
>
> "When the writ is returned, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning requests a longer time." (28 U. S. C. sec. 459.)

The above provisions are of clear and obvious import.

> "The statute does not define the term *habeas corpus.* To ascertain its meaning *and the appropriate use of the*

writ in the federal courts, recourse must be had to the *common law, from which the term was drawn,* and to the decisions of this Court interpreting and applying the common-law principles *which define its use when authorized by statute.* (Citing list of Authorities here omitted.)"—(*McNally* v. *Hill,* 293 U. S. 131, 55 S. Ct. 24, 26; italics added.)

"The writ, in its historic form, *like that now in use in the Federal Courts,* was directed to the disposition of the custody of the prisoner. It commanded the officer to '*have* the body' of him 'detained in our prison under your custody' * * * before the judge * * *" (Id. Note 2, p. 27; italics added).

The Constitutional provision of Article I, section 9, clause 2 prohibits the suspension of the writ and procedure of the common law as defined in *McNally* v. *Hill, supra.*

However, the courts have suspended the writ in violation of the Constitution and the Federal Statute as to persons who have no attorney, and usually to those who have not the right attorney.

Appellant asserts therefore, that the court below erred in failing to grant the writ, in failing to hold a full hearing on the issue * * *

Whether or not such contention is sound we need not consider, *because in addition to the procedure mentioned in the statute,* another manner of proceeding has been approved by the Supreme Court.

(*Walker* v. *Johnson,* (C. C. A. 9) 109 F. (2) 436; italics added.)

The rule of the Supreme Court—*i. e., Ex parte Yarbrough* 110 U. S. 651, 653,—is not in point with the above rule; it applies only where the prisoner has an attorney and the procedure is confined to the indictment and judgment. On the other hand the rule in the *Yarbrough* case is entirely arbitrary, and it has in effect been overruled by

many cases, including *Frank* v. *Mangum*, 237 U. S. 309; *Johnson* v. *Zerbst*, 58 S. Ct. 1019.

For the above reasons, the District Court lacks jurisdiction to issue a writ of *habeas corpus* returnable before a United States Commissioner.

Prayer.

Wherefore, petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Ninth Circuit commanding it to certify to the Supreme Court all the records in the above cause for the purpose of having the decision reviewed by the Supreme Court.

FORREST HOLIDAY,
Petitioner.

STATE OF CALIFORNIA,
County of San Francisco, ss:

Subscribed and sworn to before me this 15 day of October, 1940.

E. J. MILLER,
Associate Warden, U. S. Penitentiary,
Alcatraz, Calif.

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

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